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Of Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

ADIDAS AMERICA, INC. and
ADIDAS AG,

Plaintiffs,

v.

HERBALIFE INTERNATIONAL, INC.,

Defendant.

No. CV09-661 MO

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
VOLUNTARY DISMISSAL OF CLAIMS
OR, ALTERNATIVELY, FOR LEAVE TO
AMEND COMPLAINT

Plaintiffs adidas America, Inc. and adidas AG (collectively, "adidas") respectfully submit this memorandum in support of their Motion for Voluntary Dismissal of Claims or, Alternatively, for Leave to Amend Complaint.

I. DISCUSSION

adidas respectfully moves the Court to allow it to voluntarily dismiss, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, all causes of action (and claims for damages) in adidas's Complaint filed on June 12, 2009 (Dkt. 1), with the exception of adidas's First Claim for Relief (Breach of Contract) as discussed below. Alternatively, if the Court prefers to accomplish this same result in another way, adidas respectfully moves for leave to amend its Complaint, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, in order to remove all causes of action (and claims for damages), with the exception of adidas's First Claim for Relief (Breach of Contract) as discussed below.

In support of adidas's motion, adidas shows the Court as follows:

1. On June 12, 2009, adidas filed its Complaint (Dkt. 1) against Herbalife International, Inc. ("Herbalife") in this action.
2. Herbalife filed an Answer in this action on or about April 5, 2010 (Dkt. 114), in which Herbalife asserted certain counterclaims. Since then, all of Herbalife's counterclaims have been fully adjudicated and, accordingly, Herbalife would not suffer any prejudice by the dismissal (or, as the case may be, removal via amendment) of adidas's remaining causes of action as provided herein.
3. On August 10, 2010, this Court dismissed Herbalife's Fourth Counterclaim (Third-Party Beneficiary). (Dkt. 159.)
4. On February 24, 2011, this Court granted partial summary judgment in favor of adidas on adidas's First Claim for Relief concerning Herbalife's breach of Paragraph 5 of the parties' 1998 Settlement Agreement (the "1998 Agreement"), which, in turn, also resolved

Herbalife's First Counterclaim (seeking a declaration of "non-breach" of the 1998 Agreement) in favor of adidas. (Dkt. 223; Dkt. 237, p. 2.)

5. On March 1, 2011 (and, thus, just a few days after this Court's summary judgment ruling on February 24, 2011), counsel for adidas sent an email to Herbalife's counsel, in which adidas offered Herbalife an option to "effectively resolve all remaining claims between our respective clients and eliminate the need for trial" along similar lines to the motion now being filed by adidas. The March 1 email from adidas's counsel further stated that "[e]ach side will dismiss all of their remaining claims so as to permit the Court's [] summary judgment order (Dkt 223) to be deemed a 'final order' appealable by Herbalife." A true and correct copy of the referenced March 1, 2011 email is attached hereto as Exhibit A.

6. Herbalife declined to dismiss its Second Counterclaim (Intentional Interference with Contractual Relations) and its Third Counterclaim (Unfair Competition), notwithstanding the Court's February 24 Order and the absence of any case law or evidence supporting such counterclaims. As a result, on March 31, 2011, adidas moved for entry of summary judgment on Herbalife's last remaining counterclaims. (Dkt. 227 and 228.)

7. On August 1, 2011, this Court granted summary judgment in adidas's favor and against Herbalife on Herbalife's Second Counterclaim (Intentional Interference) and its Third Counterclaim (Unfair Competition), and reaffirmed the Court's previous ruling on the interpretation of the 1998 Agreement. (Dkt. 237.)

8. The Court's Orders dated August 10, 2010; February 24, 2011; and August 1, 2011 have fully resolved all of Herbalife's counterclaims and, additionally, have resolved the central dispute between the parties concerning the interpretation of the 1998 Agreement. As a result, and consistent with its position expressed in the attached March 1 email, adidas now desires to avoid further litigation on its remaining causes of action, including its demand for monetary damages.

9. For these and other reasons, adidas hereby agrees to voluntarily dismiss, pursuant to Rule 41(a)(2), all remaining unadjudicated causes of action, with the exception of adidas's First Claim for Relief (Breach of Contract) as it concerns Paragraph 6 of the 1998 Agreement.¹ In the alternative, adidas seeks leave to amend its Complaint, pursuant to Rule 15(a), to strike and otherwise remove: (i) Paragraph 49 (First Claim for Relief, concerning ¶ 7 of the 1998 Agreement); (ii) Paragraph 50 (as it concerns a demand for damages); (iii) adidas's Second through Seventh Claims for Relief in their entireties (¶¶ 51-78); and (iv) Paragraphs 4-5 of the Prayer for Relief (as it concerns a demand for damages).

10. The dismissal proposed herein (or the alternatively-proposed amendment of adidas's Complaint) will bring this action significantly closer to final judgment, as it will resolve all pending claims and issues with the sole exception of adidas's forthcoming request for clarification concerning the Court's ruling as to Paragraph 6 of the 1998 Agreement. Notably, the relief requested herein also will eliminate the need for any trial (and, as a consequence, will save the parties and the Court considerable time and expense).

As a final matter, adidas notes that it will gladly present the Court with a proposed Order concerning this matter if the Court wishes for adidas to do so.

DATED: September 9, 2011

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¹ By way of a motion to be filed shortly, adidas shall seek clarification and judgment concerning Herbalife's additional liability under adidas's First Claim for Relief, specifically as it relates to Paragraph 6 of the 1998 Agreement, and this claim is expressly reserved. To further avoid any potential confusion, adidas also expressly maintains its First Claim for Relief as it concerns Paragraph 5, a matter already fully adjudicated by this Court, and upon which adidas intends to seek the entry of a final judgment as soon as adidas's forthcoming clarification request concerning Paragraph 6 is resolved.

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